Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-4317

Appeal MA21-00774

York Regional Police Services Board

January 12, 2023

Summary: The appellant alleges that the York Regional Police Services Board (the police) failed to conduct a reasonable search for responsive records. The police took the position that they conducted a reasonable search for responsive records in compliance with their obligations under the *Municipal Freedom of Information and Protection of Privacy Act*. The adjudicator finds that the police conducted a reasonable search for responsive records and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, RSO 1990, c M.56, section 17.

OVERVIEW:

[1] The York Regional Police Services Board (the police) received the following access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> From [specified date range], was there any Production Order, Court Order or Subpoena's served upon [named cellular provider] for producing any records associated with the cell phone number [specified number] registered in my name. I would like to have a copy of the affidavit submitted for obtaining any such orders, [as well as a copy] of the order issued and copy of all the records obtained from [named cellular provider] including the affidavit (I.T.O.) submitted to obtain those records.

[2] The police issued a decision letter stating that the requested records were not under their custody or control. They suggested that the appellant contact the Superior Court of Justice in Newmarket to obtain the information she sought.

[3] The requester (now the appellant) appealed the police's decision.

[4] The appellant then contacted the Newmarket Court and an exchange took place between the appellant and a court clerk and then between the appellant and a representative of the Ministry of the Attorney General (MAG) regarding obtaining the records she sought.

[5] The appeal moved to the mediation stage and the police advised the mediator that although the Newmarket Court would be able to provide stamped copies of the records, they also had copies of the original records. The police agreed to disclose the records to the appellant provided that she obtained the consent of an individual whose interests may be affected by disclosure (the affected party). The appellant obtained the affected party's consent, which the mediator forwarded to the police. The police then issued a revised access decision disclosing the records to the appellant.

[6] The appellant took the position that additional records ought to exist, in particular two tele-warrants that had been identified in an email from the MAG representative, and which were discussed in an exchange of correspondence between the police's General Counsel and the appellant, which is addressed in more detail below. Accordingly, the reasonableness of the police's search for responsive records became the sole issue in the appeal.

[7] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*. I decided to conduct an inquiry and sought representations from the police on the facts and issues set out in a Notice of Inquiry. The police provided responding representations. I then sent a Notice of Inquiry to the appellant along with a copy of the police's representations. The appellant provided responding representations.

[8] In this order, I find that the police have demonstrated that their search for responsive records is in compliance with their obligations under the *Act*. I conclude that the police conducted a reasonable search for responsive records and the appeal is dismissed.

DISCUSSION

Did the institution conduct a reasonable search for records?

[9] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for

records as required by section 17 of the *Act*.[1] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[10] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[2]

[11] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[3] that is, records that are "reasonably related" to the request.[4]

[12] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[5] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[6]

The police's representations

[13] The police submit that they initially responded to the appellant's request by advising the appellant to request records from the Superior Court of Justice in Newmarket. The police explain that they did this because the appellant was not the subject of the investigation or eventual criminal trial for which the production order was sought.

[14] The police state that in the course of mediation, and after receiving the affected parties' consent, they issued a revised access decision outlining the records that were in their possession that were responsive to the request and disclosed those records in full to the appellant. The police state that their search for these responsive records had been conducted by a member of the police's Freedom of Information Unit. The police take the position that no other responsive records exist within their custody or control.

[15] The police submit that also in the course of mediation the appellant sent correspondence to the Chief of the police demanding the release of the two responsive tele-warrants that she believed existed. The police submit that their Supervisor of the Freedom of Information Unit conducted further searches for additional responsive records, including tele-warrants, but that no additional records were found.

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[1] Orders P-85, P-221 and PO-1954-I.
[2] Order MO-2246.
[3] Orders P-624 and PO-2559.
[4] Order PO-2554.
[5] Orders M-909, PO-2469 and PO-2592.
[6] Order MO-2185.

[16] The police submit that their General Counsel responded to the appellant's letter to the Chief by advising her that she had already been provided with all the records that existed in relation to the mobile phone number and that the police did not have any other production order, tele-warrant or any other judicial authorization that related to the production of the requested mobile phone records.

[17] In their representations, the police explained that the appellant's mobile phone number was part of a larger project being conducted by the police and that numerous warrants had been obtained around the same time frame relating to other investigations.

[18] The police state that in response to their General Counsel's letter the appellant sent further correspondence to the General Counsel advising them that after she had received the police's initial decision she asked the Newmarket Court for the records and was informed there were two sealed tele-warrants relating to her request. The police say that the appellant attached an email to her correspondence regarding the exchange between the appellant and the Court relating to tele-warrants. This email will be discussed below. The appellant was also advised in the email exchange that the tele-warrants were sealed.

[19] The police submit that the email from the Court (and provided to the police by the appellant) does not actually state that the tele-warrants were in the appellant's name, rather it states that there were two sealed tele-warrants and it identifies the police Detective who obtained them (amongst other things). The email also stated that the court clerk was unable to confirm if these warrants were in relation to the appellant's mobile phone number.

[20] When the police's Freedom of Information Supervisor learned of the exchange of correspondence between the appellant and the police's General Counsel, the Supervisor reached out to the police Detective to ask if they were in relation to his investigation involving the appellant's mobile phone number.

[21] The police describe the Detective's response as follows:

> The Detective responded by advising that back in [specified date] he had spoken to the Supervisor of the Court Operations at the Newmarket Court House and was made aware that the appellant was provided information regarding two sealed tele-warrants. However, this information was provided to her in error and the two warrants have no connection to the appellant's mobile phone number and were not related to the investigation
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> ….

[22] The police take the position that they have provided the appellant with all the responsive records within their custody or control that existed in relation to the mobile phone number. They add that no records pertaining to the relevant investigation have

been purged in compliance with the police's records retention policy.

The appellant's representations

[23] The appellant's representations focus on her position that the tele-warrants referred to in the email exchange between her and the Newmarket Court are responsive records and should be disclosed to her. She also says that the Detective did not comply with the procedural requirements to obtain warrants and that the police Detective improperly sealed the tele-warrants to prevent her from getting a copy.

Analysis and finding

[24] As set out above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. In order to satisfy its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody and control.

[25] In all the circumstances, I find that the police properly interpreted the scope of the request and I find that, based on the searches they conducted and who was tasked with conducting them, the police have made a reasonable effort to locate records responsive to the request.

[26] I have considered and rejected that appellant's argument that additional records exist. In that regard, I accept the police's evidence that the two tele-warrants referenced in the email exchange between the appellant and the Newmarket Court have no connection to the appellant's mobile phone number, were not related to the relevant investigation and that information relating to them was provided to the appellant in error. Although this is a circumstance that may unfortunately have led to the appellant's belief that additional records should exist, it does not establish any reasonable basis for me to conclude that additional records exist.

[27] Accordingly, in all the circumstances, I find that the police have conducted a reasonable search that is in accordance with the requirements of the *Act*.

ORDER:

I uphold the reasonableness of the police's search for responsive records and dismiss the appeal.

Original Signed by: January 12, 2023

Steven Faughnan
Adjudicator